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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

HYPOINT TECHNOLOGY, INC.,

Petitioner,

vs.

HEWLETT-PACKARD COMPANY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a plaintiff in an ever-growing service economy have standing to sue under the Sherman Act when it purchases a service or product from the defendant; resells that service or product at a substantial discount; is acknowledged by the defendant to be a competitor; is specifically targeted by the defendant to be put out of business; and is put out of business with the result of higher prices and less competition in the relevant market? (The Sixth and Ninth Circuits conflict on this issue, and the Sixth Circuit's decision is not in accordance with the principles of the precedents of this Court.)

2. Does a plaintiff, a customer/competitor of the defendant, directly affected by defendant's monopolizing conduct, have antitrust standing under the doctrine of *Hanover Shoe v. United Shoe Machinery*, 392 U.S. 481 (1968) and *Illinois Brick v. Illinois*, 431 U.S. 720 (1977)?

3. Does the forced demise of a plaintiff, which accounted for a not insubstantial amount of commerce of the market dominated by the defendant, diminish competition in that market?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were HyPoint Technology, Inc. and Hewlett-Packard Company.

Petitioner HyPoint Technology, Inc. has no parent companies or subsidiaries to list pursuant to Rule 29.1.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner HyPoint Technology, Inc. ("HyPoint") respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on November 21, 1991. A timely petition for rehearing was denied on January 7, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 949 F.2d 874 and is reprinted in the appendix attached at 1a. The judgment of the United

States District Court for the Northern District of Ohio is reprinted in the appendix at 13a. The Court of Appeals for the Sixth Circuit's Order denying HyPoint's Petition for Rehearing with Suggestion for Rehearing *En Banc* is reprinted in the appendix at 16a.

JURISDICTION

Invoking jurisdiction under 15 U.S.C. Section 2 (Sherman Act Section 2), petitioner brought this suit in the Northern District of Ohio. On April 25, 1990, after a jury verdict with interrogatories was returned in petitioner's favor, *see* appendix at 13a, the district court entered judgment in favor of HyPoint.

Hewlett-Packard ("HP") appealed, and the Sixth Circuit entered a judgment and opinion on November 21, 1991 reversing the district court's judgment on the ground that HyPoint failed to demonstrate antitrust standing. *See* appendix at 1a. HyPoint filed a timely Petition for Rehearing with Suggestion for Rehearing *En Banc* on December 5, 1991. The Court of Appeals denied HyPoint's petition on January 7, 1992.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved is 15 U.S.C. Section 15. It is set out verbatim in the appendix at 17a.

STATEMENT OF THE CASE

HP is a computer manufacturer which also services its own computers on both a contractual basis and a time-and-materials ("T&M") per service call basis. HyPoint provided only contractual service to customers needing maintenance for HP computers.

Because HyPoint perceived that HP's service contracts were vastly overpriced compared with the price of HP's T&M service, HyPoint sold service contracts for HP machines at a price cheaper than HP contracts. Joint Appendix filed in the Sixth Circuit on December 18, 1991, No. 90-3526 ("Joint App.") at 218. HyPoint provided service for the machines in two ways: 1) for approximately 88% of the service, HyPoint purchased field service from HP on a T&M basis and resold this service to its customers on a contractual basis at a substantial discount from HP's contract price; and 2) for approximately 12% of the service, HyPoint provided its own depot repair service, whereby customers mailed broken parts to HyPoint, which repaired or exchanged them and sent them back to the customer. *Id.* at 212, 215.

The Sixth Circuit acknowledged that customers had an "extreme sensitivity to the speed of response when their computers were down." Appendix at 5a. The principal reason customers contracted with HyPoint was that they were able to obtain field service within four hours, but at a substantially reduced rate. Joint App. at 377.

At no time did HyPoint merely resell HP's T&M services or HP's contract services at the same price HP was charging for repairs. HyPoint created its own contract services by bundling T&M, four-hour response,

depot repair and exchange, HyPoint's acceptance of risk inherent in the T&M procedures, and a contract price 20-30% less than HP's contract price. *Id.* at 215-16. The risk inherent in HyPoint's business was that T&M service was based on the actual time and materials expended, the price for which is not capped.

HyPoint's distinctive expertise was that it had determined the failure rates of HP hardware. With this knowledge it could spread the risk of computer failure among its customers at a lower cost. If failures were higher than HyPoint had calculated (requiring more T&M repairs), then HyPoint would have suffered substantial losses. As it happened, because HyPoint's risk assessment was sound, and because HP's service contracts were overpriced (producing gross margins ranging from 400-800%, *id.* at 216-18) HyPoint found consumer acceptance. Its service revenues rose from $37,000 to $347,000 in three years before HP specifically targeted HyPoint and drove it out of business. *Id.* at 224-25.

HP itself recognized that there was a market for HP service and that HyPoint was a competitor in that market. An internal HP memorandum stated: "Like all computer manufacturers, HP has competition in the market for support and service of HP products." Plaintiff's Exhibit 5, *Id.* at 643. HP also recognized that "[t]he competitive situation in this area from third party support companies and maintenance insurance brokers is becoming a challenge." Plaintiff's Exhibit 36, *Id.* at 657-58.

In an effort to regain customers it had lost to HyPoint, HP adopted a plan to eliminate, and did in fact

eliminate, the four-hour response time for T&M customers, including HyPoint. Plaintiff's Exhibit 30, *Id.* at 650. HP knew that four-hour response time was critical to computer service customers. Thus, after HP changed its policy, if a customer wished to receive service within four hours, that customer would be forced to contract with HP at a higher price. *Id.* at 380.

That is precisely what happened. HyPoint went out of business soon after HP instituted a policy to rid itself of competitors like HyPoint. *Id.* at 228-29. For example, one typical HyPoint customer who contracted with HP after the policy change testified: "We were being forced to go back to Hewlett-Packard." *Id.* at 380. An internal HP memorandum illustrates HP's concerns with one of its customer's decisions to go with HyPoint:

> Hy Point Technology, an Insurance Company, has moved into Union Carbide and caused the loss of over $400,000 in Annual Support Revenues Nationwide to HP. We must revisit our uplift charges for 4 hour response coverage to BMMC and non contract customers.

Plaintiff's Exhibit 33, Joint App. at 653-54. Customers had less choice at a higher price. *Id.* at 382.

Additionally, there was no evidence that new competitors entered the market. The Sixth Circuit stated to the contrary in its opinion, appendix at 8a, but made no citation to the record (nor could it have made a citation to that effect).

When HyPoint learned of HP's plan to force it out of business it brought an action against HP based on Sherman Act Section 2 for monopolization of the market for

service of HP equipment. The district court granted HyPoint's motion for a preliminary injunction, which was reversed by the Sixth Circuit on the ground that the district court made insufficient findings pursuant to Federal Rule Civil Procedure 52(a). After a trial, the jury found in favor of HyPoint by answering six interrogatories affirmatively. The district judge entered judgment in favor of HyPoint in the amount of $1.5 million (after trebling).

The Sixth Circuit reversed on the ground that HyPoint did not have antitrust standing because HyPoint was a "non-competitive middleman." Appendix at 10a. Approximately one month after the reversal, the Ninth Circuit reached a directly contrary result. *Yellow Pages Cost Consultants v. GTE Directories Corp.* 1991-2 Trade Cas. (CCH) ¶ 69,665 (9th Cir. Dec. 24, 1991); 1991 WL 271399. HyPoint is now seeking a writ of *certiorari*.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The questions presented are novel; the Sixth Circuit expressly acknowledges this fact. Appendix at 8a. The questions presented also involve the important and growing service sector of the United States economy. Because historically manufacturing has been more important than service in the United States economy, this Court's antitrust jurisprudence has not for the most part addressed service issues.

Although the questions presented have not previously been addressed by this Court, the Sixth Circuit's decision is not in accord with the principles set out in the following cases of this Court: *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), *Cargill v. Monfort of Colorado*, 479 U.S. 104 (1986), *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983), and *Atlantic Richfield v. USA Petroleum*, 110 S. Ct. 1884 (1990).

Finally, the Sixth Circuit's decision in *HyPoint* is in direct conflict with the Ninth Circuit on the question presented in *Yellow Pages Cost Consultants v. GTE Directories Corp.*; 1991-2 Trade Cas. (CCH) ¶ 69,665 (9th Cir. Dec. 24, 1991); 1991 WL 271399.

There is no doubt that the removal of companies like HyPoint and Yellow Pages Cost Consultants from competition in the markets in which they function changes long-standing patterns of distribution. Such conduct was proscribed by this Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604, n. 31 (quoting R. Bork, *The Antitrust Paradox* 156 (1978)).

I. THE SIXTH CIRCUIT'S DECISION IN *HYPOINT* CONFLICTS WITH A RECENT NINTH CIRCUIT DECISION ON ANTITRUST STANDING.

The Ninth Circuit's decision in *Yellow Pages* directly conflicts with the Sixth Circuit's decision in the *HyPoint* case. In *Yellow Pages* the Ninth Circuit found that consulting firms which advised clients about how to advertise effectively in the yellow pages had standing to sue the

publisher of the yellow pages directory, GTE. *Yellow Pages*, 1991 WL 271399, at *2.

The people who ran the consulting firms were former sales people for GTE, and as such were in a unique position to advise advertisers on the appropriate design and placement of their advertisements in the yellow pages at a substantial cost savings. *Id.* at *1. For years GTE allowed the consulting firms to place and process orders for space and advertising in GTE's yellow pages on behalf of advertisers. When GTE changed its policy, and disallowed that practice, customers who wanted to advertise in the yellow pages had to purchase GTE yellow pages space and advertising directly from GTE. *Id.* Thus, they were no longer able to obtain the benefit of the expertise and cost savings offered by the consultants.

GTE argued that the consultants were mere "rivals," and were not competitors in the context of an antitrust case. *Id.* at *4. The Ninth Circuit disagreed, finding that the consultants were in competition with GTE: "[c]onsultants also serve the function . . . of imposing 'an essential discipline on producers and sellers of goods to provide the consumer with a better product at a lower cost. . . .'" *Id.* (quoting *United States v. Syufy Enterprises*, 903 F.2d 659, 662-63 (9th Cir. 1990)). According to the Ninth Circuit, because the consultants offered not only their inside knowledge of GTE's yellow pages directly but also a substantial savings to the consumer, the consultants qualified as competitors for antitrust purposes. *Id.*

HyPoint's position in the market for the service of HP computers is similar to that of the consultants'

position in the market for advertising in the yellow pages. Consumers benefitted from the presence of both HyPoint and the consultants. Like the consultants, the principals of HyPoint knew HP computers extremely well, and because of that expertise HyPoint was able to offer its customers a lower price. Like the consultants, HyPoint offered an alternative to HP, thereby providing the end user with a better product at a lower cost.

The mere fact that HP was able to eliminate HyPoint from the market is not dispositive that HyPoint was an "inefficient competitor" as the Sixth Circuit found. Appendix at 9a. The consultants were eliminated from the market and the Ninth Circuit still found that they had antitrust standing.

Additionally, as was the case in *Yellow Pages*, an injury to competition was shown. The mere fact, cited by the Sixth Circuit, Appendix at 8a, that consumers were angered by HP's decision to terminate four-hour response and looked around for other alternatives does not mean that alternatives existed.[1] Competition was injured because consumers in both cases were forced.

[1] In fact, the evidence showed that nearly all of the customers returned to HP. *See, e.g.*, Joint App. at 380. The Sixth Circuit's statement, without citation that the removal of four-hour response time made it easier for competitors to enter the market is without basis in the record. That proposition is also illogical because four-hour response was a prerequisite to servicing HP computers, as the Sixth Circuit recognized. Appendix at 4a.

Relying on the factors set out in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Ninth Circuit found that the consulting firms had antitrust standing. The court stated: "[t]here could hardly be a closer causal link than the one between GTE's refusal to let Consultants place advertisements for their clients and their clients' canceling contracts in letters to Consultants that mention the GTE policy change." *Yellow Pages*, 1991 WL 271399, *4.

The Sixth Circuit's finding that HyPoint's elimination was good for competition, and that HP's intent to eliminate HyPoint from the market was not necessarily dispositive, is in conflict with the Ninth Circuit's holding. Under the Ninth Circuit's reasoning, GTE's view of the consultants as competitors factored heavily into the court's decision that the consultants participated in the same market as GTE and thus were competitors. HyPoint was in a similar position; it participated in the market for HP service in the same way the consultants participated in the market for advertising in yellow pages.

In holding that HyPoint did not have antitrust standing, the Sixth Circuit essentially allowed HP to monopolize the market for service of HP computers. Even though there might have been other victims of the policy change by GTE, the Ninth Circuit held that an important aspect of its decision on antitrust standing was whether an antitrust violation would go unchallenged.

HP behaved in the exact same way as GTE and as the defendant in *Aspen Skiing*. All three defendants ended a business practice, without legitimate business justification, which resulted in the demise of competitors. The

Ninth Circuit's decision is completely at odds with the Sixth Circuit on this point.

Instead of reaching a conclusion similar to the Ninth Circuit, the Sixth Circuit "conclude[d] that HyPoint lacked antitrust standing to challenge HP's action for lack of the requisite antitrust causation and injury." Appendix at 12a. However, using the Ninth Circuit's reasoning, HyPoint has demonstrated both causation and injury as a result of HP's antitrust violations. The evidence at trial showed that HP intended to drive HyPoint out of business and that it succeeded in doing so. The evidence also showed that as a direct result of this action, HyPoint suffered significant damages and that customers had less choice of providers and paid higher prices. Joint App. at 229-30.

The Ninth Circuit's opinion in *Yellow Pages* is also instructive on the issue of market participants. The Ninth Circuit found that both the consulting firms which offered advice on how to advertise in the yellow pages and the publisher of the yellow pages were competitors in the same market. *Yellow Pages*, 1991 WL 271399, at *2. HyPoint's position in the market for service of HP computers is similar to that of the consultants in the market for yellow pages advertising.

The consultants offered the same product as the publisher of the yellow pages: advertising in space provided by the publisher. Similarly, HyPoint offered the same product as HP: service of HP minicomputers provided by HP. However, both the consulting firms and HyPoint added something to what they offered. The consulting firms added their advice on effective advertising while

HyPoint assumed the risk for its customers and charged its customers a lower price than HP.

Finally, the Ninth Circuit held that the " 'field of competition [includes] . . . the group or groups of sellers who have actual or potential ability to deprive each other of significant levels of business.' " *Id.* at *4 (quoting *Thurman Industries v. Pay N' Pak Stores*, 875 F.2d 1369, 1374 (9th Cir. 1984)). The court found that the consultants met that standard. HyPoint also meets that standard. HyPoint deprived HP of $347,000 of business in the last year before HP drove HyPoint out of business. The best evidence of HyPoint's effect on HP is that HP devised a plan to eliminate HyPoint.

The Sixth Circuit's finding that HyPoint had no effect on HP's monopolization of the market for HP service was clearly erroneous. Appendix at 9a. HyPoint operated as an efficient competitor for three years before HP systematically destroyed HyPoint on grounds unrelated to the merits of competition.

The mere fact that HP succeeded in eliminating HyPoint is not dispositive of HyPoint's ability to deprive HP of business. The Ninth Circuit found that the consulting firms had standing even though GTE succeeded in driving them out of business.

II. THIS COURT HAS NEVER DECIDED WHETHER A CUSTOMER/COMPETITOR SUCH AS HYPOINT OR YELLOW PAGES COST CONSULTANTS WOULD HAVE ANTITRUST STANDING; THE CIRCUITS ARE IN CONFLICT ON THIS ISSUE.

The Sixth Circuit recognized this question as a novel one. Appendix at 9a. However, the Sixth Circuit did not

perceive that the principles of this Court's precedents dictate that a company such as HyPoint should have antitrust standing under the circumstances of this case.

In the past 15 years, this Court had decided several antitrust standing cases. *See, e.g., Illinois Brick v. Illinois*, 431 U.S. 720 (1977), *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983), *Cargill v. Monfort of Colorado*, 479 U.S. 104 (1986), and *Atlantic Richfield v. USA Petroleum*, 110 S. Ct. 1884 (1990). This reflects both the difficulty and the importance of clearly determining what is injury to competition and who are competitors and customers with standing to assert that injury. The conflict between the circuits, and the reasoning of the Sixth Circuit, demonstrates that this task is incomplete.

In *Hanover Shoe v. United Shoe Machinery*, 392 U.S. 481 (1968), this Court recognized the primary interest of a competitor forced to purchase from a monopolist on discriminatory terms which caused injury both to the competitor and to customers. There the competitor was victimized by an overcharge. The defendant in *Hanover Shoe* argued that it should not be held liable where the plaintiff "passed on" the overcharge to its customers. *Id.* at 489. This Court rejected that argument, essentially holding that competition will be more effectively served if a monopolist is not permitted to avoid liability by claiming that the competitor/customer was not directly injured by an antitrust violation, because the competitor/customer was able to pass the extra costs through to its customers. *Id.*

In this case, HyPoint was victimized by an arbitrary policy to eliminate T&M service, which had no other purpose or effect than to drive HyPoint from the market. There is no distinction between the anticompetitive effect of the two practices, notwithstanding the Sixth Circuit's incorrect *dicta* to the contrary. Appendix at 8a.

In *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), this Court followed the logic of *Hanover Shoe* by denying standing to one who bought from the direct purchaser, even though extra costs had been passed to it. This Court held that "[i]t is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations." *Illinois Brick*, 431 U.S. at 747. But, it was noted, "many of the indirect purchasers . . . have such a small stake in the lawsuit that even if they were to recover as part of a class, only a small fraction would be likely to come forward to collect their damages." *Id.*

Here, as in *Hanover Shoe*, the customer/competitor is in the best position to vindicate the competition concerns of the antitrust laws. Competition in the service market for HP computers cannot be assured merely because the Sixth Circuit might be willing to confer antitrust standing on HyPoint's small and dispersed customers who were only indirectly victimized by HP's monopolizing conduct. HyPoint's injury was extinction. As the company directly victimized by the monopolization, HyPoint should have standing if the policy of promoting lawsuits most likely to restore competition to a market, the policy central to both *Hanover Shoe* and *Illinois Brick*, is to be vindicated. The Ninth Circuit clearly recognized this critical concept:

"[t]he factor [of more appropriate plaintiffs] is not, as the analysis would suggest, an exercise in identifying the select, in the style of a 17th Century Puritan village and its theological musings. It is instead an attempt to ensure antitrust violations will, in fact, be identified and remedied in our own Twentieth Century world of imperfect competition as understood by modern economics." *Yellow Pages*, 1991 WL 271399, at *6.

This Court's other cases on antitrust standing do not specifically address this situation, but they strongly support HyPoint's theory that it has antitrust standing.

In *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), the plaintiffs alleged that they were injured by a competitor's action of buying up failing bowling centers rather than allowing the centers to go bankrupt. The plaintiffs claimed their profits would have risen if there had been fewer bowling centers. The sole injury alleged by the plaintiffs was that their "competitors were continued in business, thereby denying [plaintiffs] an anticipated increase in market share." *Id.* at 484. This Court stated that "[i]t is inimical to the purpose of [the antitrust] laws to award damages for the type of injury claimed here." *Id.* at 488. In *Brunswick* the plaintiffs were claiming damages in the form of "profits they could have realized had competition been reduced." *Id.* Because the increase, not the reduction, in competition is the focus of the antitrust laws, plaintiffs did not have standing.

The contrary is true here. By causing the elimination of service providers like HyPoint from the market, HP caused a reduction in competition. After HyPoint was driven from the market, customers were left with fewer

choices and paid higher prices for service. Joint App. at 229-30. This is certainly "the type of loss that the claimed violations [monopolization] . . . would be likely to cause." *Id.* at 489 (quoting *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969)).[2]

In this Court's next major antitrust standing case, this Court considered whether an employee who had group medical coverage had standing to sue an insurance company because it reimbursed patients only for a psychiatrists's services, not a psychologist's. *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). While this Court read the statute broadly this Court recognized that "[i]t is reasonable to assume that Congress did not intend to allow every person tangentially affected to maintain an action." *Id.* at 477.

This Court considered two factors in determining whether the plaintiff had antitrust standing: "(1) the physical and economic nexus between the alleged violation and the harm to plaintiff and (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making a defendant's conduct unlawful . . . ." *Id.* at 478.

This Court held that "[t]he harm to McCready and her class was clearly foreseeable; indeed, it was a

[2] In fact, a plaintiff "need not 'prove an actual lessening of competition in order to recover.' " *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 482 (1982) (quoting *Brunswick*, 429 U.S. at 489, n. 14)).

necessary step in effecting the ends of the alleged illegal conspiracy." *Id.* at 479. This Court found that the injury alleged was an "integral . . . aspect of the [alleged violation]." *Id.*

Here, the physical and economic nexus between the alleged monopolization and the harm to HyPoint is apparent. Shortly after HP cut off its four-hour response, HyPoint went out of the maintenance business, leaving customers with fewer choices and having to pay higher prices. As in *Blue Shield*, the harm to HyPoint was foreseeable. Not only was the elimination of HyPoint a "necessary step" in HP's monopolization plan; it was HP's goal. Joint App. at 653-54; 675-76.

In *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983), this Court held that a union that alleged that it was injured when the defendant coerced third parties into entering business relationships with non-union firms did not have standing to sue under the antitrust laws. This Court stated that "[e]ven though coercion directed by defendants at third parties in order to restrain the trade of 'certain' contractors . . . may have been unlawful, it does not, of course, necessarily follow that still another party – the Union – is a person injured by reason of the antitrust laws. . . . " *Id.* at 529.

Again, this Court considered the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. *Id.* at 535. This Court also considered the directness or indirectness of the injury, *id.* at 540, as well as the risk of duplicative recovery or complex apportionment of damages. *Id.* at 543-44. This Court found that

the Union was "neither a participant in the market for construction contracts . . . *nor* a direct victim of the defendants' coercive practices." *Id.* at 541, n. 44. This Court found the Union to be too far down the "chain of causation." *Id.* at 540.

In this case, HyPoint's elimination was the direct result of HP's action. HyPoint was both a participant in the market for service of HP computers and was a direct victim of HP's practices.

This Court again considered antitrust standing in *Cargill v. Monfort of Colorado*, 479 U.S. 104 (1986). In *Cargill*, the plaintiff brought a suit to enjoin the merger of two companies. *Id.* at 106. According to the plaintiff, if the merger were permitted then the plaintiff would have been deprived of profits because the merged company would be able to charge much lower prices. *Id.* at 107. This Court likened the plaintiff's claim in *Cargill* to that in *Brunswick*. *Id.* at 115-16. In finding that the plaintiff did not demonstrate antitrust injury this Court held: "[t]o hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share." *Id.* at 116. In this case, however, as the Sixth Circuit noted, HP's prices went up, not down. Appendix at 8a.

In its most recent case on antitrust standing, this Court held that a company is not injured within the meaning of the antitrust laws when it loses sales to a competitor that charges non-predatory prices. *Atlantic Richfield v. USA Petroleum*, 110 S. Ct. 1884 (1990). This Court held that "injury, although causally related to an

antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny, 'since it is inimical to [the antitrust] laws to award damages for losses stemming from continued competition." *Id.* at 1889 (quoting *Cargill v. Monfort of Colorado*, 479 U.S. 104 (1986)). This Court found that the plaintiff was benefitted rather than harmed by ARCO's conduct. Thus, the plaintiff did not meet the antitrust injury requirement. *Id.* at 1890.

In this case HP's action was predatory, and thus it meets the antitrust injury requirement set out in *Atlantic Richfield*. The loss HyPoint suffered clearly "stem[med] from an competition-reducing aspect or effect of the defendant's behavior." *Id.* at 1894. In fact, HyPoint was HP's target. HP was intent on eliminating HyPoint so that HP could increase its revenues. HP accomplished that goal, and in the process severely reduced competition. Consumers were hurt by this conduct – they paid higher prices and had less choice. This case is therefore the opposite of *Atlantic Richfield*.[3]

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[3] The Sixth Circuit, in reaching its conclusion that HyPoint did not have antitrust standing, relied on two inapposite cases from other circuits. *Almeda Mall v. Houston Lighting & Power*, 615 F.2d 343 (5th Cir.), *cert. denied*, 449 U.S. 870 (1980); *General Industries v. Hartz Mountain Corp.*, 810 F.2d 795 (8th Cir. 1989).

In *Almeda Mall*, a mall owner wanted to offer electricity at the same price as that charged by the utility company. The Fifth Circuit found that because it added nothing to the service offered by the utility, the mall owner was a "non-competitive middleman." *Almeda*, 615 F.2d at 353.

(Continued on following page)

Finally, the unanimous holding in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), compels the result that HyPoint and Yellow Pages Cost Consultants should both have standing to sue under the antitrust laws. HyPoint functioned in the market for service of HP computers as Aspen Highlands did, which essentially resold another company's services (ski lift services). If the Sixth Circuit's theory about HyPoint's antitrust standing is correct, then the plaintiff in *Aspen Skiing* would not have been permitted to serve as a private attorney general and implement the antitrust laws.

The Ninth Circuit essentially recognized that companies like HyPoint and Yellow Pages Cost Consultants are part of an "optimal pattern of distribution" which developed over time. *Aspen Skiing*, 472 U.S. at 604, n. 31 (quoting R. Bork, *The Antitrust Paradox* 156 (1978)). Judge Bork recognized the importance of this concept in his book *The Antitrust Paradox*:

> In any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns

(Continued from previous page)

HyPoint is not analogous to the mall owners in *Almeda Mall* who wished merely to resell electricity. HyPoint did not merely resell HP service, it furnished that service *at a lower price* than HP.

The Eighth Circuit in *General Industries* held that a brokerage firm that earned commissions by promoting direct sales to retailers did not have antitrust standing. *General Industries*, 810 F.2d at 809. However, HyPoint is not similar to a brokerage firm. It sold HP service at a lower cost to its customers.

> that do develop and persist we may call optimal patterns. By distributing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs.

Id. This concept was adopted by this Court in *Aspen Skiing*.

III. THE DEMISE OF HYPOINT, WHICH, WHILE IT WAS IN EXISTENCE, TOOK A NOT INSUBSTANTIAL AMOUNT OF BUSINESS AWAY FROM HP, BY DEFINITION DIMINISHED COMPETITION.

The Ninth Circuit in *Yellow Pages* held that "the 'field of competitors [includes] . . . the group or groups of sellers who have actual or potential ability to deprive each other of significant levels of business.'" *Yellow Pages*, 1991 WL 217399, at *4 (quoting *Thurman Industries v. Pay N' Pak Stores*, 875 F.2d 1369, 1374 (9th Cir. 1984)).[4] Another function competitors serve, according to the Ninth Circuit, is "imposing 'an essential discipline on producers and sellers of goods to provide the consumer with a better product at a lower cost . . . .'" *Id.* (quoting *United States v. Syufy Enterprises*, 903 F.2d 659, 663 (9th

[4] The inquiry of the field of competitors is used in the context of determining the relevant market. *See, e.g., Los Angeles Memorial Coliseum Com. v. National Football League*, 726 F.2d 1381, 1392-93 (9th Cir. 1984). Courts look to whether sellers "have the ability — actual or potential — to take significant amounts of business away from each other." *Id.* (quoting *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978)).

Cir. 1990)). HyPoint served both functions, and thus should be considered a competitor for antitrust purposes.

Because of its unique ability to gauge the market for service of HP computers, HyPoint was able to make inroads into HP's share of that market quickly. HyPoint's revenues rose from $37,000 in its first year to $347,000 before HP succeeded in driving HyPoint out of the market. Joint App. at 224-25. If HyPoint had continued in business, it would most likely have been able to obtain more contracts of HP customers. Had HyPoint not been depriving HP of "significant levels of business," HP would not have been concerned about HyPoint's presence in the market.

Once HP implemented its policy of not offering four-hour response to non-contract customers, Union Carbide, a HyPoint customer, was forced to return to HP for the service of its computers.

> Union Carbide had elected to terminate all service contracts nationwide with Hewlett-Packard in favor of using HyPoint Technology, an insurance provider. We have advised Union Carbide of our new policy with regard to offering non contract customers a 4 hour response, for time and materials service. As a result, Carbide has requested quotes for BMMC and SMMC [HP contracts] on all their equipment. We are expecting them to sign up for BMMC at a minimum.

Plaintiff's Exhibit 76, Joint App. at 672-73.

The ultimate result of HP's policy change was devastating for companies like HyPoint, and for its customers. Six months after the policy change an HP document reported that: "We have lost no systems business to ISO's

[sic] and have regained some lost business from insurance brokers with our new policy." Plaintiff's Exhibit 78, Joint App. at 675-76. It is apparent from that document that HP considered both the businesses which themselves serviced HP computers and insurance companies such as HyPoint to be its competitors. The Sixth Circuit acknowledges a negative effect on competition but mistakenly characterizes it. The Sixth Circuit states that "[t]he diminution in service without a corresponding decrease in price was the economic equivalent of an increase in price, which is clearly not anticompetitive." Appendix at 8a. This statement contradicts 102 years of antitrust jurisprudence.

Because HyPoint and companies like it were able to, and did, deprive HP of "significant levels of business," its demise diminished competition. The Sixth Circuit recognized that after HyPoint customers returned to HP, "HyPoint made inquiry into having third-party maintenance organizations perform the repair services on their contracts, but the evidence reflects that these are *few and scattered*, and HyPoint was unable to locate such third-party firms for its customers in many areas." Appendix at 5a (emphasis added). Thus, because the participants in the market before the demise of insurance companies like HyPoint were HP, HyPoint and a few third-party maintenance organizations, when insurers like HyPoint went out of business a threat to HP's monopoly power was eliminated.

If competition were in fact increased, or had the potential to increase, as the Sixth Circuit held, then HyPoint would have been able to locate third-party maintenance organizations to take on its service contracts. If the

"elimination of four-hour response time also made it easier for new firms to enter the market", appendix at 8a, then those third-party maintenance firms to whom HyPoint turned should have taken on HyPoint's contracts. The fact that HyPoint was unable to find a substitute for HP is alone enough to establish the competition was diminished when HyPoint was driven out of business.

The Sixth Circuit merely assumed, without citation, that when HyPoint was driven out of the market competition was not diminished: "[b]ecause the demise of HyPoint's service contract business did not diminish competition, HyPoint is unable to demonstrate antitrust injury even under this attenuated theory linking the cause of plaintiff's injury and the purposes of the antitrust laws." Appendix at 9a. The jury, however, found that HP's action *did* result in a lessening of competition. *See* Interrogatory Number 4, Appendix at 14a. Without insurers like HyPoint in the market, customers were forced to go to HP for their service contracts at higher prices. By terminating the four-hour response option for non-HP service customers, HP increased its market share in the service market.

CONCLUSION

HyPoint Technology, Inc. respectfully requests that this Court grant its petition for *certiorari* in order to rule on this novel, important question, and in order to resolve the conflict in the circuits.

Respectfully Submitted,

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HyPoint Technology, Inc.

Dated: February 5, 1992

No. 90-3526

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HyPoint Technology, Inc., *Plaintiff-Appellee,* v. Hewlett-Packard Co., *Defendant-Appellant.*	)	On Appeal from the United District Court for the Northern District of Ohio

Decided and Filed November 21, 1991

Before: JONES and NORRIS, Circuit Judges; and JOINER, Senior District Judge.*

CHARLES W. JOINER, Senior District Judge Defendant Hewlett-Packard Co. (Hewlett-Packard) appeals from a judgment in favor of the plaintiff, HyPoint Technology, Inc. (HyPoint), in the amount of $1,500,000, treble the jury verdict. The complaint, filed on September 23, 1987, alleged in Counts I and II that the defendant

* The Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

unlawfully attained or maintained a monopoly in violation of section 2 of the Sherman Act. 15 U.S.C. § 2. Count III alleged a state law claim that Hewlett-Packard intentionally interfered with lawful contractual relations. The complaint sought both money damages and injunctive relief.

On February 24, 1988, the district court issued a preliminary injunction against the defendant, from which an appeal was taken. The injunction was vacated by this court on February 21, 1989, for insufficient findings of fact, the court reciting that "the record does not reveal that HyPoint has raised 'serious questions' for an antitrust violation." *HyPoint Technology, Inc. v. Hewlett-Packard Co.*, No. 88-3237, slip op. at 4 (6th Cir. Feb. 21, 1989). The district court on remand refused to allow the defendant to present by summary judgment various issues going to legal deficiencies in plaintiff's theory. The case then proceeded to trial, in the course of which plaintiff conceded abandonment of the attempted monopolization[1] and state law claims. On April 25, 1990, judgment was entered as set forth above. Defendant appeals, contending that the court erred in not directing a verdict and not granting judgment notwithstanding the verdict. We agree, and now reverse.

---

[1] Plaintiff abandoned the attempted monopolization claim in light of the evidence that Hewlett-Packard possessed a market share more than sufficient for a finding of monopoly in the relevant market for which plaintiff argued.

I.

Hewlett-Packard manufactures and sells computers. It also has a service organization for the repair and maintenance of its minicomputers. There was evidence that Hewlett-Packard's service organization accounted, during the period of issue, for approximately $800 million of an $806 million annual market in the service of Hewlett-Packard minicomputers. Only about one-seventh of Hewlett-Packard's income was derived from its service operations, however. Hewlett-Packard offered two service options for owners of its minicomputers: (1) a service contract covering repair and maintenance, for a set annual fee, or (2) repair for malfunctioning systems on a per-incident basis, for which the owner was charged the cost of the labor and materials involved – the "time-and-materials" (T&M) option.

HyPoint was initially a dealer in used minicomputers, including Hewlett-Packard minicomputers. In the course of this activity, HyPoint's employees had access to the service logs for Hewlett-Packard minicomputers which HyPoint was considering purchasing. HyPoint's principals became aware that Hewlett-Packard minicomputers were highly reliable and showed a diminished need for service as compared to other minicomputers. HyPoint's principals concluded that the annual costs of T&M service to owners of Hewlett-Packard minicomputers would be a great deal less than the cost of a service contract for the same period.

HyPoint took advantage of this disparity by entering into the business of selling service contracts to Hewlett-Packard minicomputer owners in 1984, at a substantial

discount from Hewlett-Packard's price. Instead of performing the repair services with its own customer engineers, however, as Hewlett-Packard did, HyPoint utilized Hewlett-Packard's T&M service to carry out the repairs. HyPoint's customers contacted Hewlett-Packard directly in order to request service, and HyPoint either paid the T&M invoices generated by Hewlett-Packard, or reimbursed the customer. HyPoint sold its contracts for three years without incident, and made greater net profits from the venture in each year, from $37,000 in the 1984-85 fiscal year to $347,000 in the 1986-87 fiscal year.

It is not apparent from the record exactly when Hewlett-Packard became aware of HyPoint's activities, but it appears that it was not long after HyPoint began offering the contracts. This litigation arises from a decision announced by Hewlett-Packard in August 1987. Prior to that time, a customer engineer was guaranteed to be on site within four hours of the call for service. This four-hour guarantee was standard for contractual customer, and available for a fee to T&M customers, under the "Premium Response Time Option." HyPoint utilized this option as a matter of course. On August 1, 1987, Hewlett-Packard announced that the Premium Response Time Option would no longer be offered. After that time, a customer engineer was only guaranteed on-site within four hours for Hewlett-Packard contractual customers. Because HyPoint used Hewlett-Packard's T&M service to carry out its contracts, the business of HyPoint was affected.

The effect of the decision on HyPoint's business was immediate. There was testimony at trial from numerous

customers of HyPoint's, or firms which had been considering HyPoint's contracts, indicating the customers' extreme sensitivity to the speed of response when their computers are down, a proposition which can easily be believed. HyPoint made inquiry into having third-party maintenance organizations perform the repair services on their contracts, but the evidence reflects that these are few and scattered, and HyPoint was unable to locate such third-party firms for its customers in many areas. HyPoint lost virtually all of its service customers within a short time after Hewlett-Packard's decision was announced.

HyPoint's theory at trial was that Hewlett-Packard's decision was calculated to eliminate HyPoint and similarly situated competitors from the market, without legitimate business justification. The relevant market asserted by HyPoint was the service of Hewlett-Packard minicomputers, and HyPoint presented evidence showing that Hewlett-Packard had monopoly power in that market.

Hewlett-Packard argued at trial that the relevant market was the sale of minicomputers, in which Hewlett-Packard does not have market power, and that service is simply a part of the sales market. Hewlett-Packard also argued that it had various legitimate business justifications for the decision to terminate four-hour response time to T&M customers. In moving for a directed verdict or judgment notwithstanding the verdict, Hewlett-Packard also argued as a matter of law that no antitrust violation was shown by the facts of this case, and that HyPoint lacked antitrust standing.

II.

In light of the articulation by the Supreme Court of the antitrust standing requirement for suits under the antitrust laws, beginning in 1977 with *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and developed in the next several years in, *e.g.*, *Atlantic Richfield Co. v. USA Petroleum Co.*, ___ U.S. ___, 110 S. Ct. 1884 (1990); *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983); and *Blue Shield v. McCready*, 457 U.S. 465 (1982), it is appropriate to turn first to the issue of antitrust standing before weighing the issues of relevant market, market share, etc. In other words, before discussing the claims made in this case regarding relevant market and market power we must determine if HyPoint has antitrust standing to assert claims under the Supreme Court's precedents. Although we have serious doubts that the relevant market is the service industry, believing instead that service in this case is so integral to sales that the relevant market is sales, we will for the purpose of discussing antitrust standing accept the service industry as the relevant market.

Antitrust standing to sue is at the center of all antitrust law and policy. It is not a mere technicality. It is the glue that cements each suit with the purposes of the antitrust laws, and prevents abuses of those laws. The requirement of antitrust standing ensures that antitrust litigants use the laws to prevent anticompetitive action and makes certain that they will not be able to recover under the antitrust laws when the action challenged would tend to promote competition in the economic sense. Antitrust laws reflect considered policies regulating economic matters. The antitrust standing requirement

makes certain that the laws are used only to deal with the economic problems whose solutions these policies were intended to effect.

Standing is conferred upon private antitrust plaintiffs by section 4 of the Clayton Act, which provides, in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Court stated that the statutory language requires more than mere injury proximately caused by a violation of the antitrust laws:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

429 U.S. at 489 (emphasis in original). The Supreme Court in *Brunswick* took the language "by reason of anything forbidden in the antitrust law" and gave real effect to it. 429 U.S. at 488. "Anything forbidden in the antitrust law" makes it necessary to show that the injury reflects an

"anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." 429 U.S. at 489. We are instructed in looking at the cause of the injury to look at whether the conduct was anticompetitive, and if it was not anticompetitive, standing is not shown.

The requirement of injury caused by anticompetitive conduct was not met here. Hewlett-Packard's termination of the four-hour response time for T&M customers had no anticompetitive impact. It was in fact beneficial to competing service organizations. HyPoint presented evidence showing that Hewlett-Packard's decision angered T&M customers and caused them to search for alternative service providers. The elimination of the four-hour response time also made it easier for new firms to enter the market, since it lowered the standard for service. The diminution in service without a corresponding decrease in price was the economic equivalent of an increase in price, which is clearly not anticompetitive. Hewlett-Packard's decision, standing alone, was therefore not of concern to the antitrust laws.

Plaintiff contends that it has standing because HyPoint was a "competitor" in the market. For this purpose, we are quite willing to agree that HyPoint was a competitor of Hewlett-Packard as to service contracts, in a semantic sense, but not as a matter of economics. The premise upon which HyPoint's argument rests is flawed. HyPoint's contention assumes that every injury to a competitor is an antitrust violation. The antitrust laws were enacted for "the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original); *Richter Concrete Corp. v.*

Hilltop Concrete Corp., 691 F.2d 818, 825 (6th Cir. 1982). No injury to competition was shown here.

Second, accepting for the moment plaintiff's inapposite focus upon plaintiff's alleged competitor status, no injury to competition occurred as a result of HyPoint's elimination from the market. HyPoint's business had no effect upon Hewlett-Packard's monopolization of the market. The goal of competition is the elimination of the inefficient competitors. HyPoint had no potential to make the alleged monopolist, Hewlett-Packard, more efficient, since HyPoint was forced to pay for Hewlett-Packard's services in order to carry on its business. Hewlett-Packard was free to reduce output and increase prices, the standard evils of monopoly power, to the same extent whether or not HyPoint existed. A logical flaw in plaintiff's theory is that Hewlett-Packard could have achieved exactly the same effect upon HyPoint's business merely by raising the cost of its T&M service. In fact, Hewlett-Packard did so subsequent to the filing of this suit, but HyPoint wisely declined to assign this action as a fresh antitrust violation. Because the demise of HyPoint's service contract business did not diminish competition, HyPoint is unable to demonstrate antitrust injury even under this attenuated theory linking the cause of plaintiff's injury and the purposes of the antitrust laws.[2]

While none of the Supreme Court's precedent on the antitrust standing question addresses alleged market participants who function as HyPoint does here, two other

[2] Plaintiff did not attempt to prove that HyPoint's injury resulted from an antitrust violation to HyPoint as a consumer of Hewlett-Packard's services.

courts of appeals have reached identical conclusions to ours in similar circumstances. In *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343 (5th Cir.), *cert. denied*, 449 U.S. 870 (1980), the Fifth Circuit held that the owners of shopping malls lacked standing under the antitrust laws to force an electric company to provide power to only one hook-up in the malls, from which the owners could re-sell the power to their tenants. The court observed:

> What the Malls wish to do is to pre-empt the utility's business for their own profit, not as true competitors for the same market.
>
> We hold that appellants have proven no antitrust violation and no antitrust injury.
>
> The trial court noted, and we agree, that the activity sought by the appellants is more akin to mere "substitution" than to competition. By achieving the goal to resell electricity on the retail level, appellants will be merely plugging themselves into the flow of electricity and reaping profits as a non-competitive middleman.

615 F.2d at 353. In *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795 (8th Cir. 1987), the Eighth Circuit held with minimal analysis that a terminated brokerage firm, which merely solicited retail purchasers for the defendant manufacturer, lacked standing as a consumer or competitor to bring an antitrust action. Like the plaintiff in *Almeda Mall*, HyPoint functioned as a "non-competitive middleman." There was no causal link shown in this case between the termination of the four-hour response time, or its fatal impact upon HyPoint's service contract

business, and any diminution of competition such as would trigger antitrust scrutiny.

In addition, HyPoint has not incurred an antitrust injury. Damages do not constitute "antitrust injury" unless "attributable to an anti-competitive aspect of the practice under scrutiny," *Atlantic Richfield*, 110 S. Ct. at 1889. Plaintiff asserts that HyPoint had competitive significance in the market because HyPoint occasionally carried out minor repairs upon small portable components at its facility, using its own employees. However, while this activity was competition in the relevant market, it was not the source of plaintiff's damages. The damages for which HyPoint sought compensation at trial resulted from the inability of HyPoint, after Hewlett-Packard's policy change, to fulfill the terms of its contracts by using Hewlett-Packard's T&M service, a circumstance arising solely from its *vicarious* service business. We recognize that HyPoint probably also lost some revenue from these minor repairs by HyPoint's own personnel when HyPoint lost its service contract customers; however, nothing prevented HyPoint from continuing to offer this kind of service in isolation after Hewlett-Packard's decision. HyPoint therefore received no cognizable antitrust injury.

Plaintiff relies upon Hewlett-Packard's intent to eliminate plaintiff and others similarly situated, one of the five factors set out by this court in *Southhaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (6th Cir. 1983); *see also Peck v. General Motors Corp.*, 894 F.2d 844, 846 (6th Cir. 1990). In *Southhaven*, however, this court expressly disclaimed an intent to restrict the standing inquiry to the factors listed. *See also Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) (pointing out that, "in *McCready*, we specifically held: 'The

availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the [defendants],' " *id.* at 537, and that it is "virtually impossible to announce a black-letter rule that will dictate the result in every case," *id.* at 536). Our review is not confined to a pro forma checklist, but is directed to the difficult question of the competitive significance of the activity at issue. The standing inquiry "forces the parties and the court to reason closely about the nature of the antitrust violation alleged in order to test whether the injury and damages claimed by the plaintiff match the rationale for finding any violation in the first place." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, § 334.2a, at 324-25 (Supp. 1989). We conclude that Hy-Point lacked antitrust standing to challenge Hewlett-Packard's action for lack of the requisite antitrust causation and injury.

III.

In light of our decision on antitrust standing, it is not necessary to fully analyze and discuss the claims made by the defendant that the trial court erred regarding the relevant market, or in other respects. We have already indicated that we have doubts that the product market (minicomputer service) is the relevant market in this case, when quality and cost of service so profoundly affect sales. The court finds that the plaintiff lacks antitrust standing, therefore, defendant is entitled to judgment.

REVERSED, with direction to enter judgment for the defendant.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HYPOINT TECHNOLOGY, INC.	)	JUDGE ALVIN I. KRENZLER
Plaintiff	)	
	)	CASE NO. C87-2434
-vs-	)	
HEWLETT-PACKARD COMPANY	)	*MEMORANDUM RE: JURY VERDICT FOR PLAINTIFF AND AWARD OF DAMAGES*
Defendant	)	
	)	
	)	(Filed Apr. 25, 1990)

This case came on for trial before a jury, and the jury returned a verdict for the plaintiff, HyPoint Technology, Inc., and against the defendant, Hewlett-Packard Company, and awarded damages in the amount of $500,000.

In addition, the jury responded to interrogatories as follows:

INTERROGATORY NO. 1:

Do you find by a preponderance of the evidence that there is a relevant market limited to the repair and maintenance of Hewlett-Packard ("HP") computer systems, separate and apart from (a) the repair and maintenance of computer systems generally, and (b) the sale and service of computer systems generally?

Answer: Yes.

INTERROGATORY NO. 2:

Do you find by a preponderance of the evidence that HP has monopoly power in the alleged market you were asked about in interrogatory No. 1?

Answer: Yes.

INTERROGATORY NO. 3:

Do you find by a preponderance of the evidence that HP had no legitimate business reason whatsoever for its August 1987 modification of its Premium Response Option for T&M customers (which substitutes next-day response for guaranteed four-hour response)?

Answer: Yes.

INTERROGATORY NO. 4:

Do you find by a preponderance of the evidence that HP's August 1987 modification of its Premium Response Option for T&M customers caused either (a) a market-wide increase in the price of service for HP systems, or (b) a marketwide reduction in the total number of firms servicing HP systems?

Answer: Yes.

INTERROGATORY NO. 5

Do you find by a preponderance of the evidence that HP's August 1987 modification of its Premium Response Option for T&M customers caused injury in fact to Hy-Point's business or property?

Answer: Yes.

INTERROGATORY NO. 6

State the amount in dollars (reduced to present value) of the damage, if any, that you find HyPoint suffered to its business or property as a result of HP's August 1987 modification of its Premium Response Option for T&M customers.

Answer: $500,000.

15 U.S.C. § 15 provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws shall recover threefold the damages sustained and the cost of suit, including a reasonable attorney's fee.

Inasmuch as the jury returned a verdict and awarded damages in the amount of $500,000 to the plaintiff, judgment shall be entered for the plaintiff, HyPoint Technology, Inc., and against the defendant, Hewlett-Packard Company, in the amount of $1,500,000.00.

The plaintiff shall submit its costs of suit and an application for reasonable attorney's fees on or before May 16, 1990.

/s/ Alvin I. Krenzler
UNITED STATES
DISTRICT JUDGE

Ronald Katz
Leslie Jacobs
Robert Skitol

No. 90-3526

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HYPOINT TECHNOLOGY, INC., Plaintiff-Appellee,	)	
v.	)	ORDER
HEWLETT-PACKARD COMPANY, Defendant-Appellant.	)	(Filed Jan. 7, 1992)

BEFORE: JONES and NORRIS, Circuit Judges; and JOINER,* Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

*Hon. Charles W. Joiner sitting by designation from the Eastern District of Michigan.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only –

(1) whether such person or the opposing party, or either party's representative, made

motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumental titles of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may seek to recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if –

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28 immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section –

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28

(As amended Sept. 12, 1980, Pub.L. 96-349, § 4(a)(1), 94 Stat. 1156; Dec. 29, 1982, Pub.L. 97-393, 96 Stat. 1964.)

Court, U.S.
FILED
FEB 25 1992
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No. 91-1244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HYPOINT TECHNOLOGY, INC.,

Petitioner,

v.

HEWLETT-PACKARD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent disagrees with petitioner's formulation of the questions presented, because it mischaracterizes the record in this case. Respondent would state the questions presented as follows:

1. Does the decision below, based on a full trial record, that petitioner lacked antitrust injury because respondent's conduct was not anticompetitive conflict with the Ninth Circuit's decision in another case, based on a summary judgment record, that there was a triable issue whether plaintiffs in that case had met various elements of antitrust standing? If so, does that conflict warrant this Court's review?

2. In holding that petitioner lacked antitrust injury because respondent's conduct was not anticompetitive, did the court of appeals correctly find that respondent's conduct did not injure competition in the alleged market for service of respondent's computers in light of undisputed evidence that, *inter alia*, (a) no service firm existing at the time of the conduct at issue was injured by that conduct; and (b) new service firms entered the alleged market following that conduct?

RULE 29.1 STATEMENT

Respondent Hewlett-Packard Company has no parent corporation and no subsidiary corporations other than wholly owned subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1244

HYPOINT TECHNOLOGY, INC.,

Petitioner,

v.

HEWLETT-PACKARD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondent Hewlett-Packard Company ("HP") submits this opposition to the petition for a writ of certiorari. Petitioner HyPoint Technology, Inc. ("HyPoint") claims that (1) the decision below is in conflict with a decision of the Ninth Circuit and (2) the court of appeals below misapplied this Court's decisions concerning antitrust standing and injury. These assertions are incorrect. The court of appeals below held, based on a full trial record, that HyPoint

lacked antitrust injury to maintain this action because HP's conduct was not anticompetitive. That holding in no way conflicts with the Ninth Circuit's holding on summary judgment that there was a triable issue whether plaintiffs in that case had met various elements of antitrust standing. Nor did the court of appeals misapply this Court's antitrust standing and injury decisions. To the contrary, it correctly applied those decisions to the record in this case. Accordingly, review is not warranted.

COUNTERSTATEMENT OF THE CASE

A. Statement of Facts

1. HP manufactures, sells and services computers. It offers service to users of its computers on both contractual and time-and-materials ("T&M") bases. Under HP's contractual arrangements, the user pays a monthly fee and receives a broad array of services, including remedial and regularly scheduled preventive maintenance, site environmental surveys and, for certain HP systems, remote diagnostics and predictive support. Under a T&M arrangement, the user pays for labor (including travel) and parts on a per-incident basis to have an HP Customer Engineer repair malfunctioning equipment or perform other requested services. *See generally* Court of Appeals Joint Appendix ("C.A.J.A.") at 400-01, 403-11.

HP's standard response-time commitment for T&M service requests is that a Customer Engineer will arrive at the user's site within three working days of the user's call. For an additional charge, any user may purchase HP's Premium Response Option uplift and receive a faster response-time commitment for T&M calls. Prior to August 1, 1987 users could obtain

guaranteed four-hour response under this Option. Effective August 1, 1987 HP modified the Premium Response Option so that, for the same uplift fee, an HP Customer Engineer will arrive at the user's site within the next business day.

HyPoint buys and sells used HP computer equipment. *Id.* at 204-05. In addition, HyPoint sold insurance contracts to HP computer users to cover their expenditures for HP-provided T&M service. HyPoint had never sought or obtained any commitment from HP to continue offering guaranteed four-hour T&M response. It also knew that HP's literature had expressly warned that the offering was "subject to change without notice." *Id.* at 243-44, 708. Nevertheless, HyPoint contended that it had a business strategy that relied on use of HP's four-hour T&M response by HyPoint-insured computer users and that its insurance business was adversely affected by HP's change in the Premium Response Option. HyPoint brought a treble damage action under Section 2 of the Sherman Act, 15 U.S.C. § 2, claiming that the Premium Response Option modification constituted monopolization of an alleged market for "the maintenance and repair of HP hardware systems." C.A.J.A. at 19-20.[1]

2. In its statement of the case, HyPoint makes a number of factual assertions that form the foundation of its legal position that (1) the decision below is in

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[1] HyPoint's complaint also included counts for attempted monopolization, alleged violations of state law and injunctive relief. At trial, HyPoint abandoned all but the damage claim for monopolization, and the sole claimed damages thereunder flowed from lost existing or potential contracts in its former maintenance insurance business.

conflict with a Ninth Circuit decision and (2) the court of appeals misapplied this Court's antitrust standing and injury decisions. These assertions are designed to create the impression that HyPoint was an efficient, independent competitor in the market it alleged for service of HP computers—something other than an insurer or reseller of HP service—and that the Premium Response Option modification injured both HyPoint and competition generally. While HyPoint's legal arguments are without merit even under its view of the facts, we nevertheless address HyPoint's numerous misstatements of fact, as required by Rule 15.1 of the Rules of this Court. As will be shown, resolution of the legal questions framed by HyPoint would require the Court first to accept a version of the facts that lacks record support and is contradicted by HyPoint's own evidence.

a. HyPoint makes two factual contentions to support its assertion that it was an efficient, independent competitor in the service market. First, it asserts that it did not simply rely on T&M service performed by HP Customer Engineers, but also used its own personnel to perform "depot repair and exchange." Pet. at 3-4.[2] Second, HyPoint cites several internal HP documents describing "competition" from HyPoint. *Id.* at 4-5. The testimony of HyPoint's own witnesses makes clear, however, that neither of these assertions supports the proposition that HyPoint was HP's competitor for antitrust purposes in the alleged market for service of HP computers.

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[2] Depot repair and exchange refer to service work performed at a central facility, not at the user's site.

As to depot repair, HyPoint's president testified that depot repair is used for service of peripheral equipment, such as terminals, which can be feasibly and efficiently taken off-site, not for service of hardware systems (i.e., central processing units ("CPUs") and disk drives), which are too large to be taken off-site. C.A.J.A. at 247-48. Further, according to his testimony, HyPoint's maintenance insurance program relied solely on HP's T&M service and did not include depot repair by HyPoint personnel. *Id.* at 219-21.[3] Thus, HyPoint's depot repair of terminals did not qualify HyPoint as a competitor in the market it alleged for the service of HP hardware *systems*.

HyPoint's complaint, which was filed after the T&M change and after HyPoint had entered into all of the contracts at issue in this case, squarely contradicts HyPoint's new characterization of its business. HyPoint there admitted (*id.* at 17-18) that it

> does not maintain its own inventories or employ its own service engineers. HyPoint participates in the business of maintaining HP systems by entering into service contracts with users of HP systems. When a user under contract with HyPoint needs service, HyPoint arranges and pays for an HP customer engineer to perform the service on a time and materials basis.

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[3] Consistent with this testimony, the "Services Provided by *HyPoint SERVICES*" section of HyPoint's form maintenance agreements stated only that HyPoint would "pay all charges associated with [HP's] travel, labor, parts and materials," and nowhere referred to any depot repair or other service to be performed by HyPoint.

HyPoint's president also admitted at trial that HyPoint never had a field service engineer who repaired HP systems at the user's site and that HyPoint could not itself service systems (i.e., CPUs and disk drives). *Id.* at 211, 247-48. HyPoint's computer industry expert also drew a sharp distinction between service of systems and depot repair of peripheral devices or subsystems. *Id.* at 302.

Moreover, HyPoint's witnesses testified only as to the existence and size of and HP's alleged power in a market for on-site service of HP hardware systems. HyPoint never introduced evidence on the existence and size of or HP's market share or power in a market including firms that provide depot repair service. Finally, as the court of appeals pointed out (*see* Pet. App. at 11a) and as HyPoint does not dispute here, HyPoint did not seek damages at trial for any injury to its depot repair business as a result of the Premium Response Option modification.[4]

As to the internal HP documents describing "competition" from HyPoint, the testimony of HyPoint's expert economist makes clear that such evidence is irrelevant to deciding whether, for antitrust purposes, HP and HyPoint were competitors in the alleged service market. HyPoint's economist testified that firms merely insuring or reselling service actually provided by others do *not* belong in the same market for purposes of antitrust analysis as the providers themselves. C.A.J.A. at 293-94. Moreover, as with depot repair firms, HyPoint introduced no evidence on the

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[4] The Premium Response Option modification could not have had any impact on depot repair work, where response time is not critical.

size, composition or HP's share of a market including such insurers or resellers. Such a market, by HyPoint's admission (*see* HyPoint C.A. Br. at 4, 9 n.9), would have to include such industry giants as IBM and Digital Equipment Corporation (which in some circumstances act as insurers or resellers of HP service). The inclusion of such firms in the relevant market would destroy HyPoint's contentions that HP has monopoly power and that there is a market limited to service of HP systems.

b. HyPoint makes three general factual contentions to support its assertion that the Premium Response Option modification injured competition: (1) HyPoint "went out of business" as a result of that change; (2) there was no evidence either that new competitors entered the service market after that change or that the change made it easier for competitors to enter the service market; and (3) consumers were injured as a result of the change by being forced into signing higher-priced service contracts from HP. Pet. at 5, 9 n.1. HyPoint's own evidence disproves each of these assertions.

HyPoint's assertion that it went out of business after HP modified the Premium Response Option is false. HyPoint's president admitted that the company continued in the depot repair business after the T&M change and that the T&M change never even threatened HyPoint's other line of business, the buying and selling of used HP equipment. C.A.J.A. at 230; Dist. Ct. Rec. 235 at 118. And, while HyPoint's owners did abandon the insurance business after filing this case, they then entered the HP system service business by acquiring a small, Maryland-based independent service organization ("ISO") for no money down.

C.A.J.A. at 236-38. In no more than 6-8 months, they had expanded that business into what they describe as a "nationwide field organization." *Id.* at 712.

HyPoint's assertion that "there was no evidence that new competitors entered the market" (Pet. at 5) is disproved by the trial testimony of HyPoint's computer industry expert that, as of October 18, 1987, $2^1/_2$ months after the T&M change, the number of ISOs had increased from 8 to 10. Dist. Ct. Rec. 237 at 142. He also testified that, in the "1988 time frame," there were 11 ISOs. C.A.J.A. at 312.[5] Similar evidence contradicts HyPoint's assertion (Pet. at 9 n.1) that there was no record evidence that the Premium Response Option modification made it easier for service competitors. There was uncontroverted evidence—based upon a survey of ISOs performed by the organization owned and operated by HyPoint's computer industry expert—that many ISOs thought that the T&M change would help their businesses while no ISO thought that the change would hurt its business. C.A.J.A. at 539. There was no evidence that the T&M change injured any ISO that provided its own service or that any ISO left the business as a result of the change.

HyPoint seeks to show consumer injury by asserting that "after HP changed its policy, if a customer wished to receive service within four hours, that customer would be forced to contract with HP at a higher

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[5] The acquisition and expansion by HyPoint's owners of a local ISO into a national ISO also counts as new entry. United States Dep't of Justice Merger Guidelines § 3.3 n.20 (1984) (entry occurs "as fringe firms currently in the market greatly expand their current capacity").

price." Pet. at 5. But the uncontroverted evidence was that numerous ISOs also offered four-hour response time both before and after HP's Premium Response Option modification. HyPoint's president admitted that, following the T&M change, HyPoint could have received nationwide four-hour response from two ISOs. C.A.J.A. at 256. Indeed, as discussed above, the ISO that HyPoint's owners acquired after they filed their complaint here and abandoned the insurance business offers four-hour response time nationwide. *Id.* at 249, 251-52, 717.

There is simply no record evidence that customers generally were forced into higher-priced service arrangements (either from ISOs or from HP itself) as a result of the Premium Response Option modification. The only evidence as to prices paid by consumers after the change was that one customer paid less for an HP service contract after the T&M change than for the insurance arrangement it had at the time of the change (*id.* at 637-38), while another paid more for better and additional service under an HP service contract than it had received under its insurance arrangement (*id.* at 631).[6]

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[6] The pages of the record cited by HyPoint to support its assertion that consumers were forced into higher prices (C.A.J.A. at 229-30, 382) do not support that proposition. The first portion is the testimony of HyPoint's president that, in an action unrelated to the Premium Response Option modification, HP raised its T&M labor rate. But HyPoint never challenged that separate action as illegal or claimed damages from it. The second portion is the testimony of an HP user formerly insured by HyPoint that she did not believe that HP was losing money by offering guaranteed four-hour T&M response and that her preference for service by HP rather than by an ISO (*see id.* at 385-386) resulted in her having to sign a service contract with HP.

B. Course of Proceedings and Disposition Below

1. HyPoint filed its complaint and a motion for preliminary injunction on September 23, 1987. The District Court granted HyPoint's motion, concluding, *inter alia*, that HyPoint had presented serious questions going to the merits of the case. The Sixth Circuit vacated the preliminary injunction, stating that "the record [did] not reveal that HyPoint ha[d] raised 'serious questions' for an antitrust violation." Order at 4, *HyPoint Technology, Inc. v. Hewlett-Packard Co.*, No. 88-3237 (6th Cir. Feb. 21, 1989) (attached to HP C.A. Br. at 10a).

2. A jury trial was held in April 1990. HP moved for, but was denied, a directed verdict at the close of both HyPoint's case and its case. The jury entered a general verdict in HyPoint's favor, responded to 6 special interrogatories and awarded HyPoint $500,000 in damages (prior to statutory trebling). The district court entered judgment upon the verdict and subsequently denied HP's motion for judgment notwithstanding the verdict or, in the alternative, a new trial. HP appealed on five grounds, including the fact that HyPoint lacked antitrust standing and injury to maintain this action.

3. The court of appeals reversed, with direction to enter judgment for HP. The sole basis for the court's decision was HyPoint's lack of antitrust standing. It did not reach any of the other grounds for reversal urged by HP (although it twice expressed serious doubt that HyPoint's market definition limited to service of HP computers was the appropriate relevant product market, Pet. App. at 6a, 12a). Contrary to HyPoint's characterization of the decision below, the court of appeals did not rule that HyPoint was not

a competitor in any sense. Rather, the court assumed that HyPoint was a competitor but held that it lacked antitrust standing because it had not shown that it had suffered antitrust injury, i.e., " 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.' " Pet. App. at 7a (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

The court of appeals held that HyPoint had not shown antitrust injury because the Premium Response Option modification "had no anticompetitive impact. It was in fact beneficial to competing service organizations. . . . The elimination of the four-hour [T&M] response time also made it easier for new firms to enter the market, since it lowered the standard for service." *Id.* at 8a.[7] The court assumed that HyPoint competed with HP in the alleged market, but held that this assumed fact alone was not sufficient to confer antitrust standing on HyPoint. "[N]o injury to competition occurred as a result of HyPoint's elimination from the market," the court held, because "HyPoint had no potential to make . . . [HP] more efficient . . . . [HP] was free to reduce output and increase prices, the standard evils of monopoly power, to the same extent whether or not HyPoint existed." *Id.* at 9a.

The court of appeals also held that HyPoint had not suffered antitrust injury by virtue of performing

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[7] Thus, contrary to HyPoint's characterization of the decision below (Pet. at 5), the court of appeals did not hold that there was evidence that new competitors actually entered the market. In any event, the record supports such a holding. *See supra* at 8.

depot repair of peripheral equipment, because injury to HyPoint's depot repair business "was not the source of plaintiff's damages. The damages for which HyPoint sought compensation at trial resulted from the inability of HyPoint, after [HP's] policy change, to fulfill the terms of its contracts by using [HP's] T&M service, a circumstance arising solely from its *vicarious* service business." *Id.* at 11a (emphasis in original). Finally, the court held that evidence of HP's alleged intent to injure HyPoint was insufficient to confer antitrust standing on HyPoint. *Id.* at 11a-12a.[8]

REASONS FOR DENYING THE WRIT

This case does not present either a substantial issue of federal antitrust law or a conflict among the courts of appeals. To the contrary, the court of appeals correctly and straightforwardly applied settled principles of antitrust standing and injury to the facts of record.

HyPoint does not urge the Court to provide an important interpretation or clarification of the law of antitrust standing and injury. Rather, it seeks only a reversal of the result in this case. The essence of HyPoint's petition is that the court of appeals misapprehended the facts. HyPoint then bootstraps that proposition into the arguments that the decision below conflicts with the Ninth Circuit's decision in *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 1991-2 Trade Cas. (CCH) ¶ 69,665 (9th Cir. 1991), and that the court of appeals misapplied this Court's

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[8] On February 4, 1992 the court of appeals (upon HyPoint's motion and without objection from HP) stayed issuance of the mandate until April 6, 1992 pending disposition of HyPoint's petition for certiorari.

antitrust standing and injury cases. But the court of appeals correctly understood the record and applied the law, and its decision does not conflict with *Yellow Pages*. This Court should decline HyPoint's invitation to sit as a court of error.[9]

Moreover, this case is *sui generis*. The record shows that HP was the only computer manufacturer to make the offering on which HyPoint relied, and there was no evidence that anyone other than HyPoint and one other firm resold this offering. Thus, a decision by this Court would not have general application to firms throughout the economy; it would apply only to the litigants in this case. For all of these reasons, review is not warranted.

I. THE DECISION BELOW DOES NOT CONFLICT WITH *YELLOW PAGES*

The principal reason HyPoint gives for granting the petition is that the decision below allegedly conflicts with the Ninth Circuit's decision in *Yellow Pages*. In *Yellow Pages*, defendant GTE published Yellow Pages directories. It also offered customers advice on the form, content and location of Yellow Pages advertising, and then placed advertisements in the appropriate GTE directories. GTE did not separately charge for these services but included the charge in its overall rate structure. Plaintiffs were not mere middlemen, resellers or insurers. Rather, they offered customers alternate services of the same kind as GTE's but, unlike HyPoint in this case, used their own sales and consulting personnel to provide them.

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[9] "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

At some unspecified time, GTE announced that it would end its longstanding practice of letting non-GTE consultants order, place and process Yellow Pages advertising on behalf of advertisers. Some of plaintiffs' customers subsequently canceled their contracts with plaintiffs. *See generally* 1991-2 Trade Cas. at 67,013-14.[10]

The district court granted GTE summary judgment on the ground that plaintiffs had failed to raise triable issues on antitrust injury and standing. The Ninth Circuit vacated and remanded. The court cited evidence that, in response to plaintiffs' substitute services, GTE told advertisers that it would help them reduce their Yellow Pages advertising, i.e., GTE would lower its price. *Id.* at 67,015. Accordingly, the court held that there were triable issues whether plaintiffs had the ability to impose price and quality discipline on GTE and whether plaintiffs had suffered antitrust injury. *Id.* It also held that plaintiffs had proffered sufficient evidence on the other elements of antitrust standing to avoid summary judgment. *Id.* at 67,015-17.[11]

The decision below does not conflict with *Yellow Pages*. HyPoint recognizes that the key factor in the

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[10] Contrary to HyPoint's suggestion (Pet. at 12), GTE did not drive the consultants out of business.

[11] Contrary to HyPoint's suggestion (Pet. at 8-9), the Ninth Circuit nowhere stated that plaintiffs had antitrust standing simply because they were "competitors" or allegedly provided consumers with a better or lower-priced product. Similarly, contrary to HyPoint's assertion that "an injury to competition was shown" in *Yellow Pages* (*id.* at 9), the Ninth Circuit expressly declined to rule on whether GTE's rate structure was anticompetitive. 1991-2 Trade Cas. at 67,013 n.1.

Ninth Circuit's decision was plaintiffs' ability to discipline GTE. Pet. at 8. But HyPoint never explains how it could have imposed any discipline on HP, nor does it ever confront the court of appeals' determinations that "HyPoint had no potential to make . . . [HP] more efficient" and that HP "was free to reduce output and increase prices . . . to the same extent whether or not HyPoint existed." Pet. App. at 9a.

The fundamental difference between the two cases is that, in *Yellow Pages*, plaintiffs could and apparently did discipline GTE while, in this case, there is no evidence or economic basis for believing that HyPoint could discipline HP. In *Yellow Pages*, plaintiffs used their own personnel to provide consulting services to their customers. In this case, HyPoint simply reimbursed its insureds for their use of HP's Customer Engineers.[12] Because plaintiffs in *Yellow Pages* used their own personnel, they could impose discipline: if GTE raised its price, it would lose business to plaintiffs; if GTE lowered its price, it would take business away from plaintiffs. Indeed, GTE apparently lowered its prices in response to plaintiffs' consulting activity. In this case, by contrast, there was no evidence that HP ever reduced its prices in response to HyPoint's maintenance insurance offering.

HyPoint contends that it could discipline HP because, in its capacity as a maintenance insurer, it allegedly deprived HP of significant levels of business.

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[12] Thus, HyPoint is wrong in asserting that "it participated in the market for HP service in the same way the consultants participated in the market for advertising in yellow pages." Pet. at 10.

Pet. at 12, 21-24. This contention is incorrect. HyPoint's insurance offering was not a form of price discipline. Rather, as HyPoint's president testified, that offering merely exploited a price disparity between HP's service contracts and HP's four-hour T&M response uplift; HyPoint gambled that, in light of the low failure rate of HP's systems, it could make money by reselling HP's four-hour T&M response uplift at a price between HP's price for that uplift and HP's price for its service contracts. C.A.J.A. at 215-18. Thus, as the Sixth Circuit explained when it vacated the preliminary injunction previously entered in this matter (*see supra* at 10), HyPoint was not "in competition with H-P to provide service. Rather HyPoint . . . [was] an arbitrager/insurer providing H-P's customers with H-P's service." Order at 2 n.1, *HyPoint Technology, Inc. v. Hewlett-Packard Co.*, No. 88-3237 (6th Cir. Feb. 21, 1989) (reprinted in HP C.A. Br. at 7a).

HyPoint's maintenance insurance offering thus did not constitute either price discipline or competition in any meaningful marketplace sense. Nor did it deprive HP of significant levels of business. Instead, that offering reflected no more than a short-term arbitrage opportunity that was eliminated when HP decided no longer to offer the four-hour T&M response uplift.

Yellow Pages and the decision below differ in other important respects. In this case, the court of appeals held that HyPoint had not suffered antitrust injury because it had not made the prerequisite showing of injury to competition. In *Yellow Pages*, the Ninth Circuit expressly declined to rule whether GTE's conduct was anticompetitive and directed much of its opinion to the question whether plaintiffs had satisfied the

other elements of antitrust standing (an issue that the court of appeals below did not discuss). Moreover, the court below, on the basis of a full trial record, held that HyPoint lacked antitrust standing and injury, while the Ninth Circuit, on the basis of a limited summary judgment record, held only that there was a triable issue whether plaintiffs had antitrust standing and injury.

In short, this case and *Yellow Pages* involve wholly different records, issues and procedural postures. In light of these differences, there is no conflict between the two decisions and thus no conflict between the courts of appeals requiring this Court's review.[13]

II. THE DECISION BELOW CORRECTLY APPLIED AND IS FULLY CONSISTENT WITH THIS COURT'S ANTITRUST STANDING AND INJURY DECISIONS

While HyPoint asserts that this case presents novel issues (Pet. at 12), the essence of its second argument for granting the petition is that the court of appeals misapplied this Court's antitrust standing and injury decisions. Contrary to HyPoint's suggestion (*see id.*

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[13] Even if there were a conflict between the decision below and *Yellow Pages*, review would not be warranted because HyPoint does not identify any other court of appeals that has considered the allegedly similar questions this case and *Yellow Pages* present. "[T]here is already in place . . . a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." Justice Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983) (quoted in R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 200 (6th ed. 1986)). And, while the decision below is strongly supported by other appellate decisions (*see* Pet. App. at 9a-11a), there is no appellate decision supporting *Yellow Pages*.

at 12-13), the court of appeals did not rule as a *per se* matter that firms such as HyPoint lack antitrust standing. Nor does HyPoint urge the Court to provide a new interpretation or clarification of the existing law of antitrust standing and injury. Rather, it merely seeks reversal of the decision below that, based on the facts of record in this particular case, HyPoint did not suffer antitrust injury and thus did not have antitrust standing. That holding does not warrant review.

The decision below is a straightforward application of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), which held that a private antitrust plaintiff

> must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 489 (emphasis by the Court). Relying on *Brunswick*, the court of appeals stated that "[w]e are instructed in looking at the cause of the injury to look at whether the conduct was anticompetitive, and if it was not anticompetitive, standing is not shown." Pet. App. at 8a.

HyPoint does not challenge the legal holding that injury to competition is a prerequisite of antitrust injury, but instead challenges the court's factual determination that HP's conduct was not anticompetitive. The court held that HP's conduct—the Premium Response Option modification—was not anticompeti-

tive because it could not injure competitors in the alleged service market. The T&M change "was in fact beneficial to competing service organizations" by "ma[king] it easier for new firms to enter the market" and "lower[ing] the standard for service." Pet. App. at 8a.[14] Thus, HyPoint lacked standing as a competitor to challenge the change.[15]

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[14] HyPoint contends that the court of appeals' statement that an effective price increase is not anticompetitive "contradicts 102 years of antitrust jurisprudence." Pet. at 23. To the contrary, it is settled that even monopolists are free to charge monopoly prices. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 296-98 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 704 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 872 (1984). *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 710′ at 558 (Supp. 1991) ("[m]ere monopoly pricing is not a violation of the Sherman Act").

[15] HyPoint describes itself as a customer as well as a competitor (Pet. at i, 12), and cites *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (Pet. at i, 13-14), apparently to support its standing as a customer. These cases provide no such support. In *Hanover Shoe*, the Court held that a purchaser that had passed on overcharges to its own customers would still normally (though not always) be able to recover damages from the seller. In *Illinois Brick*, the Court held that indirect purchasers could not recover damages for overcharges passed on to them. In this case, HyPoint is not seeking, either as a direct or indirect purchaser, to recover damages for overcharges. The only damages for which HyPoint is seeking recovery flow from alleged lost actual and potential maintenance insurance contracts it sold or would have sold in purported competition with HP. HyPoint does not claim any damages in its alleged role as a purchaser. Accordingly, even assuming HyPoint correctly characterized its reimbursement for HP T&M service as purchasing activity, HyPoint nevertheless suffered no antitrust injury as a

The decision below is strongly supported by this Court's decisions in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990) ("*ARCO*"). In *Matsushita*, this Court held that competitors "stand to gain from any conspiracy" by other competitors "to raise the market price" and thus would lack antitrust injury to challenge such an action. 475 U.S. at 582-83. Similarly, in *ARCO*, the Court held that a competitor would lack antitrust injury to challenge a maximum price fixing scheme the alleged effect of which was to prevent defendant's dealers "from offering services desired by consumers," because such an effect would help rather than hurt the competitor. 110 S. Ct. at 1890.[16]

The holding below that HP's conduct was not anticompetitive because its natural effect would be to benefit competing service firms is fully consistent with *Matsushita* and *ARCO*. HyPoint tries to argue that holding is contrary to the record by asserting that there was no evidence that competitors actually benefitted from HP's conduct. *See* Pet. at 9 n.1. That assertion is legally unfounded and factually incorrect. As a legal matter, neither *Matsushita* nor *ARCO* requires record evidence that competitors actually benefitted. It was enough in both cases (as it should be

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purchaser. For these reasons, this case does not present HyPoint's second question presented (*see* Pet. at i).

[16] HyPoint mischaracterizes *ARCO* in asserting (Pet. at 19) that plaintiffs in *ARCO* in fact were helped rather than hurt by ARCO's conduct. To the contrary, the Court recognized that plaintiff had suffered losses as a result of ARCO's conduct, but held that those losses did not flow from an anticompetitive aspect of it. 110 S. Ct. at 1890-91.

here) that defendants' conduct could be expected as an economic matter to benefit competitors. As a factual matter, there was ample evidence—all supplied by HyPoint's witnesses—that new ISOs entered the market and that many ISOs thought that the Premium Response Option modification would help them while no ISO thought that the change would hurt it. *See supra* at 8.[17]

In the end, the essence of HyPoint's argument for antitrust standing is that its injury "was the direct result of HP's action" (Pet. at 18) and that, because the price of its maintenance insurance was lower than the price of HP's service contracts, the demise of its insurance business "by definition diminished competition" (*id.* at 21). The first statement is insufficient as a matter of law. In *ARCO*, this Court squarely held that "injury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anticompetitive aspect of the practice under scrutiny."

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[17] HyPoint asserts that HP's competitors must have been injured because "four-hour response was a prerequisite to servicing HP computers." Pet. at 9 n.1. That suggestion is specious to the extent it suggests that the availability of four-hour response from HP was a prerequisite for competing service firms to be in the business of servicing HP computers. There was no evidence that such response by HP was a prerequisite for competing *service* firms to enter or continue in the business or even that any such firm relied on four-hour T&M response from HP. Indeed, it makes no sense that ISOs, which by definition use *their own* service personnel to service *their* customers' systems, could be injured by HP's decision to drop a particular service to *its* customers. The only evidence was that HP's four-hour T&M response uplift was useful to HyPoint in its maintenance insurance business.

110 S. Ct. at 1889. Thus, it is not enough for HyPoint to claim that its injury directly resulted from the Premium Response Option modification. HyPoint had to—but did not—show more, i.e., that its injury resulted from an *anticompetitive* aspect of HP's conduct.

Moreover, HyPoint's demise as a maintenance insurer did not injure competition, even if its insurance premium was lower than HP's service contract price. Injury to HyPoint does not prove injury to competition. "[I]njury to the plaintiff alone is not sufficient to prove injury to competition." *Three Movies of Tarzana v. Pacific Theatres, Inc.*, 828 F.2d 1395, 1400 (9th Cir.1987), *cert. denied*, 484 U.S. 1066 (1988). Indeed, the "exclusion of one or even several competitors" raises no antitrust concern unless "it impairs the health of the competitive process itself." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) (Posner, J.). In this case, as discussed *supra* at 8, there was no evidence of injury to the competitive process. To the contrary, the undisputed evidence was that, following the Premium Response Option modification, new firms (including the one acquired by HyPoint's owners after they abandoned the insurance business) entered the business of servicing HP systems. And there was no evidence that any competing *service* firm (as opposed to insurance firm) was injured by the Premium Response Option modification.[18]

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[18] HyPoint seeks to draw parallels between this case and *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985), which involved defendant's withdrawal from a joint marketing arrangement. Pet. at 20. Unlike this case, however, *Aspen* did not involve antitrust standing and injury issues. Moreover,

III. THIS CASE DOES NOT PRESENT ANY GENERALLY APPLICABLE ISSUE OF ANTITRUST LAW, SO A DECISION WOULD BE LIMITED TO THE LITIGANTS IN THIS CASE

The decision below does not raise any issue that is either generally applicable or likely to recur. The record below was clear that only HP offered the kind of service on which HyPoint relied (C.A.J.A. at 306, 326, 516-17), and there was no evidence that anyone other than HyPoint and one other firm resold this offering. More generally, there is no record evidence and HyPoint makes no showing in its petition that arrangements of the kind at issue in this case are pervasive in other sectors of the economy. To the contrary, HyPoint's computer industry expert testified that no company has spent more than four years in the maintenance insurance business. C.A.J.A. at 335-36. At bottom, this case involves only an idiosyncratic arbitrage opportunity created by the pricing disparity between HP's service contracts and its four-hour T&M response uplift. *See supra* at 16. There is no reason to believe this circumstance is common in the service industry, and thus no basis for believing that review of the decision below would be of importance to the economy as a whole or likely to recur. Review would affect only the parties to this case.[19]

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contrary to HyPoint's assertion (*id.*), plaintiff in *Aspen* did not merely resell defendant's destination resort skiing facilities. Rather, it operated its own ski resort and entered into a joint marketing arrangement with defendant (which operated three resorts) to offer a package of four resorts. In this case, by contrast, HyPoint never had a field service operation, and there was never a joint marketing operation of the sort found in *Aspen*.

[19] It is not even clear that review would affect the parties,

HyPoint asserts without more that this case raises important issues involving the service industry. As shown throughout this opposition, however, the decision below is sharply limited by the record and the peculiar nature of HyPoint's maintenance insurance business. Moreover, issues relating to the service sector of the economy are more appropriately presented by firms that actually participate therein, namely, service firms. HyPoint in its role as a maintenance insurer is not the proper party to raise any such issues.

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except by needlessly prolonging the litigation. As shown *supra* at 6-7, HyPoint presented market share and market power evidence only as to an alleged market limited to firms providing their own service on HP computers. HyPoint's evidence did not include either (1) firms that provide depot repair or (2) firms (including IBM and Digital Equipment Corporation) that also arrange for service by others. Accordingly, there is no evidence that HP has monopoly power—a requirement of a Section 2 monopolization claim (*United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966))—in the market as HyPoint would now define it. Moreover, the court of appeals reached only one of five grounds for appeal advanced by HP, and did not reach other grounds (for example, HyPoint's failure even to proffer evidence as to the proper definition of the geographic market, another requirement of a Section 2 claim) that would be equally dispositive of this case.

CONCLUSION

For the foregoing reasons, HyPoint's petition for a writ of certiorari should be denied.

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No. 91-1244

In The

Supreme Court of the United States

October Term, 1991

HYPOINT TECHNOLOGY, INC.,

Petitioner,

vs.

HEWLETT-PACKARD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Contrary to Hewlett-Packard's ("HP") assertions, a decision by this Court would not only affect the litigants in this case. This case presents questions of importance to the national economy. The Sixth Circuit holds that no intermediate participant in a service market can *ever* incur antitrust injury when its source of supply is eliminated by a monopolist provider – even where, as here, the intermediate repackages or otherwise alters the service in a way that benefits consumers and that consumers do not otherwise obtain. That ruling has far-reaching adverse

implications in a major portion of the economy, and it warrants review by this Court.

HP's Brief In Opposition reads like a cross petition for Supreme Court review. It argues that HP did nothing wrong, and even if it did, no one other than HyPoint was injured by its conduct. That is irrelevant, as well as wrong. The issue presented here is whether HyPoint has standing to claim the recovery to which the jury found it entitled. What is relevant is that, contrary to HP's assertions, (1) a conflict exists among the circuits on the issue of antitrust standing for service intermediaries, and (2) this question is significant and will, as the importance of service markets increases, recur until resolved.

The decision of the Court of Appeals conflicts directly with the decision of the Ninth Circuit in *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158 (9th Cir. 1991).[1] HP's attempt to distinguish *Yellow Pages* from *HyPoint* on the basis of HyPoint's alleged inability to discipline HP's prices and benefit consumers is simply wrong.

The record shows that HP's profit margins on its full service computer maintenance contract were as much as 800 percent. Joint App. at 216-18. By repackaging HP's guaranteed four-hour time and materials service calls

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[1] In fact, HyPoint has been advised by counsel for GTE Directories Corp. that GTE plans to petition this Court for certiorari arguing, as does HyPoint, that there is a direct conflict between the circuits.

within the framework of a HyPoint guaranteed full service contract, users of HP computers received the advantage of a full service contract at a price 20 to 30 percent less than HP's contract price. Once HP had driven HyPoint from the market it did not have to reduce its contract price to meet HyPoint's. *Id.* at 229. This caused direct consumer injury to users of HP computers.

The jury found that HyPoint *had* disciplined the prices HP was able to charge its service contract customers. HyPoint directly limited the price that HP could charge for its service contracts. Indeed, HP expressly recognized HyPoint's disciplining function when HP itself characterized HyPoint as a "competitor" in the HP service market. *See, e.g.*, Joint App. at 643; 657-58. The Sixth Circuit ignored this evidence of HyPoint's ability to discipline HP's *maintenance contract prices* when it erroneously concluded that "HyPoint had no potential to make . . . [HP] more efficient. . . . "[2]

For apparently no reason, the Sixth Circuit assumed that only competition from independent service organizations ("ISOs") could make HP more efficient. HP admitted, and the jury found, that HP was not disciplined by ISOs either before or after HyPoint exited the market because HP's policy change did not cause it to lose *any* "systems business" to ISOs. Plaintiff's Exhibit 78, Joint App. at 675-76. However, that does not prove that consumers were not injured by HyPoint's exit.

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[2] The Sixth Circuit focused its attention on the wrong price. It only considered whether HyPoint could discipline HP's *"time and materials"* price which is irrelevant and was not part of HyPoint's case.

HP further attempts to distinguish *Yellow Pages* from *HyPoint* on the basis that *Yellow Pages* was merely an appeal from Summary Judgment. Br. Opp. at 14. This fact puts the Sixth Circuit's dismissal of standing *more* in conflict with the reasoning of the Ninth Circuit. The Ninth Circuit recognized the possible existence of antitrust standing in *Yellow Pages*, and therefore remanded the case for further proceedings. The Sixth Circuit, by contrast, overturned the jury's findings which supported HyPoint's standing. The conflict is clear and direct.

Nor is the Ninth Circuit's reasoning in *Yellow Pages* unique among the circuits as HP suggests. Br. Opp. at 17 n.13. The Fifth Circuit has taken a similar approach. In *Almeda Mall v. Houston Lighting & Power*, 615 F.2d 343 (5th Cir.), *cert. denied*, 449 U.S. 870 (1980), a mall owner wanted to buy all of the electricity required by its tenants from the local power company. It planned to resell this power *at the same price* the power company was offering to each tenant individually. In denying standing to the mall owner, the Fifth Circuit highlighted the fact that the mall owner was not providing any competitive benefits to the tenants by replacing the power company.

The Fifth Circuit specifically distinguished between a person who purchases from a power company to resell power at a *lower* competitive retail rate (to other customers throughout a broader market), and the mall owner who was not prepared to offer retail power to retail customers outside its mall, let alone at a better price to its tenants. *Almeda Mall*, 615 F.2d at 353. The implication is that if the mall owner had acted as a lower cost service repackager, or as a substitute supplier of a different and

better service like HyPoint here, it would have had antitrust standing. The Sixth Circuit believed that its ruling in this case was consistent with *Almeda Mall*. However, the Sixth Circuit failed to recognize what the jury saw, that driving HyPoint out of business enabled HP to extract monopoly profits through its service contracts.

This Court has never addressed the precise standing issue presented in this case. However, the Sixth Circuit's reasoning behind its novel holding that a reseller in HyPoint's position can *never* allege antitrust injury is inconsistent with this Court's concerns in other antitrust decisions. In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927), for example, this Court unanimously upheld a damage award to a photo equipment stock house whose injury was attributable to Kodak's refusal to sell to it at "dealer discounts." Eradication of a middleman, such as HyPoint or a photo stock house that sells at a discount, and whose presence in the market lowers consumer prices, is exactly the harm addressed by the *Kodak* Court. This Court recognized that putting such a discounter out of business directly injures consumer welfare.[3]

Similarly, HyPoint stands in the same position as Aspen Highlands in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). It is true that the plaintiff in *Aspen Skiing* did not *merely* provide access to defendant's resort facilities. *See* Br. Opp. at 22-23 n.18. However, that was an important part of the service repackage

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[3] The *Kodak* case is still cited with approval by this Court. *See Texaco Inc. v. Hasbrouck*, 110 S. Ct. 2535, 2552 n.3 (1990).

that Aspen Highlands provided its customers. It is highly unlikely that if the respondent in *Aspen* had challenged Aspen's standing to bring its case, standing would not have been found. If consumer welfare is the goal of the antitrust laws, there is no sound reason for denying antitrust standing to companies like HyPoint.

Though it is the first, this will not be the last time this Court has to consider whether market clearing intermediaries have standing to sue a monopolist provider of parts and service. The Sixth Circuit has announced a rule which denies antitrust standing to a growing number of service intermediaries, be they called middlemen, repackagers, brokers, discounters, insurers or arbitragers. These intermediaries provide the very clearing function which assures market efficiency. More than 60 percent of the U.S. gross national product is generated in service rather than product markets. Donald F. Blumberg, *Managing Service as a Strategic Profit Center*, 33-38 (1991).

Market clearing intermediaries in service markets should be encouraged to bring antitrust cases against monopolists whose conduct impairs consumer welfare. Otherwise we discourage the arbitrage function. As one Nobel laureate economist has noted, a prejudice that arbitragers are not respectable because they do not create goods or provide nonmonetary services is "not just silly, but destructive." Harry M. Markowitz, *Markets and Morality: Or Arbitragers Get No Respect*, Wall St. J., May 14, 1991, at A22.

Because the question presented here is one on which the circuits are divided, and because, with the increasing

importance of service markets in our economy, this question will increasingly recur, this case is ripe for Supreme Court review.

CONCLUSION

For the foregoing reasons, HyPoint's Petition for a Writ of Certiorari should be granted.

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